No.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1960.

INTERNATIONAL HOD CARRIERS, BUILDING AND COMMON LABORERS' UNION OF AMERICA, LOCAL NO. 41[illegible], AFL-CIO,

v.

NATIONAL LABOR RELATIONS BOARD.

PETITION FOR A WRIT OF CERTIORARI

to the United States Court of Appeals for the Eighth Circuit.

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No. .....

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1960.

INTERNATIONAL HOD CARRIERS, BUILDING AND COMMON LABORERS' UNION OF AMERICA, LOCAL NO. 1140, AFL-CIO,

v.

NATIONAL LABOR RELATIONS BOARD.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

International Hod Carriers, Building and Common Laborers' Union of America, Local 1140, AFL-CIO, herein called the Union, prays that a writ of certiorari issue to review the opinion (A-1-15, *infra*), and decree (A-16-19,

infra) of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled case on December 22, 1960, and January 19, 1961, respectively.

OPINIONS BELOW.

The opinion of the Court of Appeals is not yet officially reported. The decision and order of the National Labor Relations Board (A-20-31, *infra*) is reported at 127 NLRB No. 74.

JURISDICTION.

The decree of the Court of Appeals was entered on January 19, 1961. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED.

1. Whether an order framed in the prohibitory language of Section 8 (b) (4) (i) and (ii) (B) of the NLRA, as amended, improperly interferes with primary picketing where the order is designed and construed to prohibit all construction site picketing of a non-union subcontractor in support of the Union's demand that he sign a legal prehire contract.

2. Whether a Union's statements to a neutral general contractor that it will continue to picket the non-union subcontractor at the construction site until the subcontractor either signs a union contract or is removed from the project constitute threats, restraint and coercion outlawed by Section 8 (b) (4) (ii) (B).

STATUTE INVOLVED.

The statute involved, Section 8 (b) (4) (i) and (ii) (B) of the Labor Management Relations Act of 1947 as amended (61 Stat. 136, 29 U. S. C., Secs. 151 et seq.; P. L. 86-257, 73 Stat. 519) now provides that it shall be "an unfair labor practice for a labor organization or its agents:"

> (4) (i) to engage in, or to induce or encourage [the employees of any employer] *any individual employed by any person engaged in commerce or in an industry affecting commerce* to engage in, a strike or a [concerted] refusal in the course of [their] *his* employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services [,]; *or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce*, where *in either case* an object thereof is:
>
> (B) *forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or* forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9 [;]: *Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;*"

The italicized language was added to, and the bracketed language was excised from, Section 8 (b) (4) (A) and (B) of the NLRA by the 1959 amendments.

STATEMENT.

1. The Uncontroverted Facts.

Simpson Company is an acoustical and insulation contractor on construction projects (R. 3; 23). In the regular course of its business it employs laborers to unload and transport materials delivered to Simpson for installation (R. 24). Because Simpson "never know[s]" when "cars of material * * * will arrive," it employs "spot laborers" on a day-by-day basis, as needed (R. 18, 24). Simpson's regular practice is to pick up such laborers at the office of the Nebraska Unemployment Bureau; they work as long as the job lasts; their services are then terminated and they are paid off by Simpson's truck driver (R. 18, 24). These laborers are not union members and Simpson pays them less than union scale (R. 22, 24, 25, 32).

On November 20, 1959, materials were delivered to Simpson at the South High School construction project on which it was then engaged and, as usual, it hired non-union day laborers to do the unloading (R. 24). When Richard Otte, one of the business agents of the Union, came to the job site that afternoon he told these laborers to stop work and go home, which they did (R. 3; 19, 22, 26, 27). Ray Watson, a truck driver for Gilmore, the general contractor on the project, was then also unloading a truck. He was being assisted by Joe Tripp, a member of the Union (R. 27-28). Otte approached Tripp and told him to stop work and go home, simultaneously telling Watson that "he didn't care what I did" (R. 28; see also Tr. 54). Watson, at the hearing, identified Tripp as an employee of Gilmore, but there is no direct evidence in the record that Otte knew that Tripp was not an employee of Simpson.[1] Tripp is the only employee of Gilmore or

[1] The court below found (A-11, *infra*) that the circumstances were such as to cause "any prudent person to at least make further inquiry before pursuing the rather drastic course followed by Otte." Petitioner does not challenge this finding.

of any subcontractor other than Simpson whom a Union agent is even claimed to have asked to cease work during this entire controversy.

After paying off his laborers, who then left the job site (R. 18, 20), Simpson's foreman approached Otte and asked what "we have to do to keep from having a picket put on the job?" (R. 3; 21). Otte replied that Simpson would have to pay all the day laborers for eight hours, and "sign a contract with the Union" under which Simpson would be bound to hire all laborers through the Union hiring hall. *(Ibid.)* Later that afternoon the Union began to picket Simpson at the job site with signs reading (R. 3-4; 22, 32):

SIMPSON CO.
REFUSES TO PAY
UNION WAGES
& CONDITIONS
LABORERS LOCAL 1140
THIS DISPUTE WITH ABOVE
EMPLOYER ONLY

At no time did any picket approach any employee of Gilmore or any other subcontractor with a request that they refrain from crossing the line (R. 33). The only person, who as far as the record shows, asked a picket about crossing, Otto Narduzzo, a foreman for Narduzzo Construction Company, was told by Otte to cross. *(Ibid.)* Nevertheless, once the picket line was established, no employee of any of the employers on the project crossed it to go to work (R. 4; 21).

On Saturday, November 21, Otte called Van Scoy, an official of Gilmore, to tell him what Gilmore "could do to prevent pickets being on there Monday morning" (R. 4; 32). He explained the basis for the Union's demand that Simpson pay the day laborers who had worked on

November 20, "for eight hours at $2.32½" and said that Simpson "would have to sign their Union Contract and hiring hall agreement" (R. 4; 32). Van Scoy then called Simpson and asked him "what he wanted to do" (R. 33). Simpson replied that "he was willing to pay union rates but that they would not sign their contract." (*Ibid.*) Then and there Van Scoy and Simpson agreed that if Simpson needed any more laborers for its work on the project, Gilmore would supply its own men, who were members of the Union, to do it (R. 26, 33). On Saturday, Simpson called Otte and, in response to Otte's statement that Simpson "would have to sign a contract" replied: "We have no contract with the Carpenters; we have no contract with the Lathers; no trades that we do work with, and I see no reason why we are required to have a contract with the Laborers when we do not hire laborers as a general rule" (R. 25).

On Monday, Van Scoy approached Otte on the picket line, told him of Gilmore's arrangement with Simpson under which "we would take care of any labor work after that time that Simpson might have to do" and asked him if the picketing would stop (R. 33). Otte replied that it would not. (*Ibid.*) Van Scoy then asked, "What do we have to do" to stop the picketing? (R. 33); and Otte replied (R. 34): "You will have to get AGC contractors to black-list Simpson and not allow him on any of your jobs." When Van Scoy said, "You are kind of picking on us, putting us in the middle," Otte answered that if "any other contractor in Omaha had Simpson on his job and he had non-union laborers that he would picket the job just the same as he has ours". (*Ibid.*) A week after the picketing started, and after Gilmore had filed its charges with the Board (R. 1, 12), another Union business agent, Schaeffer, called George Gilmore to express his "surprise" that Gilmore was "suing the Union . . .

after we had had such good relations all through the years." Gilmore asked, "what else we could do to get the pickets off" and Schaeffer answered that Gilmore could either induce Simpson to sign the same Union contract which Gilmore had signed, which contained a hiring-hall clause, or "run Simpson Company off the job" (R. 29).

2. The Board's Findings and Order.

The Board found (A-25, 26, *infra*) that the Union had "'induced and encouraged' secondary employees to cease work." It predicated that finding on two facts: (1) "Otte's instruction to secondary employee Tripp to stop working" and (2) "the picketing continued after the primary Simpson employees were no longer on the job and Respondent had been told by Gilmore that they would not be used on the job again."[2]

Although it was uncontradicted that both Otte and Schaeffer told Van Scoy and George Gilmore that the picketing would stop if Simpson signed a union contract, the Board described them as stating that the picketing would stop "only if Gilmore removed Simpson from the job." It concluded that by these statements the Union had coerced and restrained Gilmore, a neutral employer, in violation of the newly added Section 8 (b) (4) (ii) (B), and had also revealed that its picketing "had the unlawful 'secondary boycott' objective * * *, i. e., to force Gilmore to cease doing business with Simpson" (A-26, *infra*). Finally, the Board found that because the Union demanded that Simpson sign a union contract at a time when the Union was not the certified bargaining agent of Simpson's

[2] The Board reasoned that upon arranging for Gilmore's employees to do his unloading work Simpson ceased to be engaged "in its normal business at the common situs" within the meaning of the fourth *Moore Dry Dock* requirement (A-25, note 4, *infra*).

laborers, its picketing "had the unlawful 'recognition' objective of Section 8 (b) (4) (i) and (ii) (B)" (A-26, *infra*).

The Board concluded that by its inducement of Tripp, its picketing of Simpson and its statements to Gilmore officials the Union had "violated all parts of Section 8 (b) (4) (i) and (ii) (B)" (R. 7). It entered an order, in the prohibitory language of those Sections, requiring the Union to cease and desist from the violations found.[3]

The order contains no language exempting from its ban any picketing of Simpson at the South High project or elsewhere.

3. The Court's Opinion and Decree.

The court did not adopt the Board's contention that by removing his laborers from the project Simpson prevented the Union's picketing from satisfying the **Moore Dry Dock** tests (A-7-9). It held, however, that those tests are not "the single guide for our decision" as to the legality of the picketing; they are only "evidentiary in nature and they are to be employed in the absence of more direct evidence of the intent and purposes of the labor organization". In this case there was "ample direct and uncontradicted evidence pointing to the intent of Union" in picketing Simpson, *i. e.*, its inducement of Tripp

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[3] On the theory that petitioner had threatened "to involve other employers in the future" and had "committed similar violations" in the past, the Board did not limit its order to neutral employers on the South High project or to action arising out of the Union's dispute with Simpson, but enjoined petitioner from violating Section 8 (b) (4) (i) and (ii) (B) generally (A-28-29, *infra*). While approving the extension of protection to "any other employer" in connection with the Simpson grievance, the court below limited the scope of the order to action taken pursuant to that grievance (A-14-15, *infra*). No question concerning the propriety of this aspect of the order is here presented.

to cease work and its attempts to induce Gilmore to remove Simpson from the project (A-9, *infra*).

The court held that because the Union's motive in picketing was thus established "we need not determine the area of Union's rights, as against Simpson, the primary employer * * *"(A-12, *infra*). Accordingly, it rejected the Union's contention that the order should be modified to exempt picketing of Simpson, stating that "the order is designed to prohibit only that conduct which is proscribed by the statute, that is, picketing or striking for an unlawful purpose. We cannot perceive of anyone suggesting that the order can rationally be construed to prohibit lawful primary picketing or lawful primary striking" (A-13-14, *infra*). Since, in the court's view, Congress did not intend by Section 8 (f) to legalize picketing for a pre-hire contract (A-11, *infra*), the order's prohibition of all picketing against Simpson for the purpose of compelling him to execute such a contract could not trench upon picketing preserved by the proviso to Section 8 (b) (4) (ii) (B), for the proviso protects only "lawful primary picketing" (A-14, *infra*).

REASONS FOR GRANTING THE WRIT.

1. Just as **NLRB v. Denver Bldg. Council**, 341 U. S. 675, and **International Brotherhood of Electrical Workers (Langer) v. NLRB**, 341 U. S. 694, because they exemplified and reflected the Board's initial approach to "common situs" picketing, were appropriate companions to **NLRB v. International Rice Milling Co.**, 341 U. S. 665, so is the instant case, because it exemplifies and reflects the jettisoning of that approach, an appropriate companion to **Local 761, International Union, Etc. v. NLRB and General Electric Company**, No. 321, this Term, certiorari granted, 364 U. S. 869. **Local 761** subjects to review the

Board's new approach to the "an object" test, under which some picketing previously held primary is now held secondary. See Brief for Petitioner in No. 321, pp. 50-53, 61-62, 69-91. This case offers for review that aspect of the Board's new approach under which cease and desist orders in common-situs cases are now construed as prohibiting all picketing of the primary employer.

Couched in statutory language, the order ostensibly prohibits only picketing which violates the ban against secondary boycotts and their inducement. But the order is predicated on findings that the picketing of Simpson with signs publicizing the Union's primary dispute with him at a construction project where Simpson is engaged in making installations itself violates the Act.[4] Read in light of the opinions, the decree prohibits the Union, because it has violated the Act in the past,[5] from engaging in any construction site picketing of Simpson in the future. Thus, the Union is prevented from inducing employees of Simpson's suppliers to refrain from making deliveries to him and Simpson's employees to refrain from working for him.

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[4] That the Board found the picketing itself a violation appears from its express holding p. 7, n. 2, *supra*, that the picketing became illegal after Simpson removed his laborers from the project, as well as from its finding that the picketing was illegal because the Union sought to accomplish "unlawful objectives," *i. e.*, to force cessation of business and to obtain recognition.

[5] For purposes of review petitioner concedes that its inducement of Tripp was properly found to violate Section 8 (b) (4) (i) (B) and that this violation warranted entry of a cease and desist order. For the purpose of the first question only, petitioner also assumes that the statements of its agents to Gilmore were properly held to violate Section 8 (b) (4) (ii) (B), and that the order prohibiting violation of that section is also valid. The first question presented, accordingly, is whether a cease and desist order may stand without modification where, as here, it is construed to prohibit peaceful picketing of the primary employer in support of the Union's primary demand.

So construed, the order eradicates "the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes". **NLRB v. Denver Bldg. Council**, 341 U. S. 675, 692. Effectuation of "the dual congressional objectives" as defined by this Court in the **Denver** case, *ibid.*, requires that the Union's right to picket Simpson be preserved. **System Federation No. 91, Etc. v. Wright**, 364 U. S. 642. Conformity with the newly added proviso to Section 8 (b) (4) (B), and with the principles of this Court's decision in **NLRB v. Stowe Spinning Co.**, 336 U. S. 226, 232-233, requires that the reservation appear on the face of the decree. **McLeod v. Chefs, Cooks, Pastry Cooks and Assistants, Etc.**, 2 Cir., 280 F. 2d 760, 764, 765 and No. 228, decided February 8, 1961, 47 LRRM 2541.

Under the Board's initial approach, approved in the **Denver** case, picketing at a common situs insofar as it conformed to the **Moore Dry Dock** rules, was primary as a matter of law. The Board held that where a union "by its picketing signs or by its conduct elsewhere indicates that the dispute extends beyond the primary employer, and thereby directly seeks to enlist the active participation of employees of neutral employers", it violates the Act *only* to the extent that its conduct does not conform to those rules. Brief for the Board in No. 321, this Term, p. 34. Accordingly, the "usual cease and desist order" which the Board issued in such cases was construed to allow the union thereafter to picket the primary employer at the common situs "so long as it makes clear that its dispute is with" the primary employer only. **General Teamsters, Chauffeurs and Helpers, Local Union No. 249 (Crump, Incorporated)**, 112 NLRB 311, 312. To enjoin "similar [unlawful] acts in the future" was the "only appropriate remedy"; picketing in conformity with the **Moore Dry Dock** rules was necessarily exempt "because

only unlawful and not lawful conduct should be enjoined." 112 NLRB, at 315.

Contrary to the court below (A-9, *infra*), the **Moore Dry Dock** tests were not evidentiary of the union's motive in picketing the primary employer but of the category, primary or secondary, into which the picketing fell. They concretized the requirement that a picket line at a common situs attack only the primary employer by establishing objective standards for compliance with it. The union's right to bring pressure to bear against the primary employer by picketing him within the framework of the **Moore Dry Dock** rules was as absolute as the right of neutral employers to be free from pressure generated by picketing outside those bounds.[6] Consequently, the tests

[6] To the extent that the Union observed *Moore Dry Dock* rules in its picketing, any resulting work stoppage by employees of neutral employers was regarded as volunteered, not as the product of unlawful inducement. *Baltimore Building & Construction Trades Council (Piezonki d/b/a Stover Steel Service)*, 108 NLRB 1575, 1577, reversed only on the ground that by failing to identify the primary employers on the picket signs, as the fourth *Moore Dry Dock* rule requires (cf. 108 NLRB, at 1581 with 108 NLRB, at 1577), the union had not made clear that its dispute was with them alone, *sub. nom. Piezonki v. NLRB*, 4 Cir., 219 F. 2d 879, 883; cf. *NLRB v. General Drivers, Etc.*, 5 Cir., 225 F. 2d 205, 210, certiorari denied, 350 U. S. 914. As the court below acknowledged (A-6, *infra*), it was well settled that picketing within the confines of the *Moore Dry Dock* rules "will not run afoul of the statute simply because employees of neutral employers *do* honor the picket line and that this is one of the lawful benefits which may be expected to accrue from such union activities." Thus, "proof of the effect is not proof of the violation * * *." *Schauffler v. Local 30, D. Pel.*, 47 LRRM 2576, 2578, 2580. Accordingly, a union could not be required, without unduly impairing its right to lawful benefits, "to take affirmative action to negative the inducement which the mere existence of [a primary] picket line constituted by ordering the men back to work" (*Baltimore Building and Construction Trades Council, supra*, 108 NLRB at 1576), or to "advise the secondary employees * * * that the picket line is not intended to apply to them". *General Teamsters, Chauffeurs and Helpers, Local No. 249 (Crump, Incorporated)*, 112 NLRB 311, 312, note 1. A union could be required to issue such instructions, only if, because of specific union by-laws, rules or instructions, the picketing, although ostensibly directed against the primary employer, was actually a prearranged "signal" to employees of neutrals to strike. Cf. *NLRB v.*

could not be disregarded merely because there was "more direct evidence of the intent and purposes of the labor organization."

No threat to the legality of future picketing directed against primary employers was involved in the orders approved in **Denver** and **Langer**. As this Court took pains to point out (341 U. S., at 687-688, 699-700), the violations there found were based upon picketing directed entirely against neutral employers. The picket signs did not publicize the unions' disputes with the primary employers at all, and the unions did not even treat the primary employers as their adversaries. Thus, this Court described the order in **Langer** (341 U. S. at 700-701) as enjoining "peaceful picketing conducted * * * **merely** as an inducement or encouragement of employees to engage in a secondary boycott" [Emphasis supplied]. It contrasted such picketing for "an unlawful object" (341 U. S., at 704), with picketing "in furtherance of a lawful object". The epitome of picketing for a lawful object is "picketing * * * of the employer primarily involved in the controversy." **United Brotherhood of Carpenters, Etc. v. Sperry**, 10 Cir., 170 F. 2d 863, 868, cited in **Langer**, 341 U. S., at 705, note 9.[7] Such picketing, protected by Sections 7 and 13, was held additionally immunized from injunctive restraint by the protection afforded to non-coercive speech in Section 8 (c). 341 U. S., at 704-705.

As this case demonstrates, the Board's new approach to common situs picketing makes preservation of the

Denver Bldg. Council, 341 U. S. 675, 678-679, 690-691, with *International Brotherhood of Electrical Workers (Langer) v. NLRB*, 341 U. S. 695, 700. There is no suggestion that any such by-laws, rules or instructions were outstanding or operative in this case.

[7] Senator Taft contrasted "strikes in the nature of secondary boycotts," which he characterized as being for "wholly illegal and improper purposes," with strikes against the primary employer, which, excepting only jurisdictional strikes prohibited by Section 8 (b) (4) (D), he described as being "for justifiable purposes." 93 Cong. Rec. 3835, 2 Leg. Hist. LMRA, pp. 1005-1006.

union's right to picket the primary employer contingent upon its having refrained from any secondary action, on the picket line or elsewhere. Thus, picketing of the primary employer in complete conformity with the **Moore Dry Dock** rules, conduct admittedly lawful, becomes "unlawful", and is thereafter barred, if the Board infers that "the totality of the union's effort is intended to accomplish a proscribed objective by inducement of secondary employees". **Chauffeurs, Teamsters and Helpers Local Union No. 175 (McJunkin Corporation)**, 128 NLRB No. 57, 46 LRRM 1340, 1342-1343; **United Wholesale and Warehouse Employees Local 261 (Perfection Mattress and Spring Co.)**, 129 NLRB No. 125, 47 LRRM 1121; see **Milwaukee Plywood Corp. v. NLRB**, 7 Cir., decided December 20, 1960, 47 LRRM 2291, 2293. Under the new approach, adopted here by the court below, exertion of primary pressure remains permissible only "so long as [the union] played the game fair and 'according to the book'." **McJunkin** case, *supra*, fn. 5, quoting and relying upon **Carpenters' Union, Local 131 v. Cisco Construction**, 9 Cir., 266 F. 2d 365, 369, certiorari denied 361 U. S. 828. Nothing could more plainly demonstrate the incompatibility of this approach with effectuation of "the dual congressional objectives" than the admission of the court below that it is unnecessary to "determine the area of union's rights, as against Simpson, the primary employer * * *". (A-12, *infra*.)

Extinguishment of an offending union's right to exert pressure on the primary employer is in clear conflict with **System Federation No. 91, etc. v. Wright**, 364 U. S. 642, 648-649; cf. **Youngdahl v. Rainfair, Inc.**, 355 U. S. 131, 139-140. To paraphrase the **Wright** case, at page 648, the Board is not authorized to deny to unions which have offended the secondary boycott ban the privilege of picketing the primary employer, even though such a prohibition might effectuate the policy of the Act against secondary boycotts

(Cf. **Consolidated Edison Co. v. NLRB**, 305 U. S. 197, 235-236). Codifying existing law, "Congress has, by the proviso to Section 8 (b) (4) (B), specifically protected common situs picketing directed solely at the primary employer • • • even though employees of other employers refused to cross the picket line." **Schauffler v. Slate, Tile and Composition Roofers, Local 30**, D. Del., Feb. 10, 1961, 47 LRRM 2576, 2578 and note 5. Thus, the new proviso reinforces Sections 7 and 13 in establishing that it has been "legislatively determined" that the danger of secondary boycotts which may inhere in allowing such picketing is "an expense more than offset by the benefits" of allowing all unions, whether disposed to violate the Act or not, to engage in it, **Wright** case, *supra*, at p. 649. Denial of this right to violators would "render protection in no way authorized by the needs of safeguarding statutory rights, at the expense of a privilege denied and deniable to no other union," *Ibid.*, at p. 648. Denial, moreover, is in square conflict with the Second Circuit's holding in **McLeod v. Chefs, Cooks, etc.**, 280 F. 2d 760, 764, 765, that unlawful conduct "should not conclude the unions from engaging in lawful activity at a later time," and that to conform to the Act's policies an injunction must be "framed so as to curtail only that which [would run] afoul of the act."

The Board's theory, rejected below, that total prohibition of picketing is warranted because after Simpson arranged for removal from the project of those employees over whom the Union claimed jurisdiction the Union was no longer entitled, under the **Moore Dry Dock** rules, to picket him there,* as the court below acknowledged, is in

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* As demonstrated in the Brief for Petitioner in No. 321, this Term, pp. 76-89, that theory is predicated on the fallacy that the only legitimate object of primary picketing is to appeal to those employees and prospective employees of the primary employer who are directly involved in the labor dispute.

square conflict with decisions of the Fifth Circuit, the District of Columbia Circuit and the Eighth Circuit.[9] If urged here in defense of the Board's order, the contention magnifies rather than diminishes the need for review by this Court.

If, on the other hand, it should be argued that as construed by the court below the decree does not enjoin all picketing but only picketing which is unlawfully motivated, its entry conflicts with **McLeod v. Chefs, Cooks, Pastry Cooks and Assistants, etc.**, 2 Cir., Feb. 8, 1961, 47 LRRM 2541, 2542, holding that "an injunction in the words of the statute [prohibiting picketing for "an unlawful objective"] would be so lacking in precise warning that the unions could never picket at all with any degree of safety, while on the other hand a court could not make adjudications in contempt with any assurance of fairness or accuracy." Specificity in decrees, which "is basic to correct judicial administration" (**Cunningham v. English**, D. C. Cir., 269 F. 2d 517, 524, certiorari denied 361 U. S. 897), becomes "all the more essential when vagueness might induce individuals to forego their rights * * *." **Scull v. Virginia**, 359 U. S. 344, 353. In view of the findings that the picketing of Simpson violated Section 8 (b) (4) (i) (B), "[w]e must require explicit language making it clear that the mere [picketing of Simpson in accordance with the **Moore Dry Dock** rules] will not subject [petitioner] to punishment for contempt." **NLRB v. Stowe Spinning Co.**, 336 U. S. 226, 233.

Finally, whether or not Congress intended to sanction under Section 8 (b) (2) picketing aimed at forcing an em-

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[9] *National Labor Relations Bd. v. General Drivers, Etc.*, 5 Cir., 225 F. 2d 205, 209-210, certiorari denied 350 U. S. 914; *Seafarers International Union, Etc. v. NLRB*, D. C. Cir., 265 F. 2d 585, 590 and *Local 618, Etc. v. National Labor Relations Bd.*, 8 Cir., 249 F. 2d 332, 337. The court below held these cases inapposite entirely because it regarded petitioner's conduct away from the picket line as revealing that it had an unlawful intent.

ployer to enter into a pre-hire contract legalized by Section 8 (f), it is clear that picketing against the primary employer for that object cannot be outlawed by a decree issued under Section 8 (b) (4). **NLRB v. International Rice Milling Co., Inc.**, 341 U. S. 665; **Garner v. Teamsters Union**, 346 U. S. 485, 487, 488-489; cf. **Labor Board v. Drivers Local Union No. 639**, 362 U. S. 274. Consequently, the encroachment upon primary picketing effected by this decree is indistinguishable from the encroachment effected by any order which prohibits picketing of the primary employer at a common situs pursuant to any dispute over wages, hours or working conditions.

2. The holding that the statements by which petitioner sought to induce Gilmore to persuade Simpson to sign the union contract or remove Simpson from the project violated Section 8 (b) (4) (ii) (B) confirms the fears of Congressional opponents that the Section would be construed to outlaw not only threats, restraint and coercion, but all union efforts to persuade neutral employers to cease doing business with the union's adversary. 2 Leg. Hist. LMRDA,[10] pp. 1037, 1426, 1493 (1).

Representative Griffin's analysis (2 Leg. Hist. LMRDA, 1523 (1)), on which the Board relied (A-26, note 6, *infra*), itself shows that Section 8 (b) (4) (ii) (B) was designed to do no more than reverse the rule that a union could lawfully induce a neutral employer to boycott the primary employer by threatening to take illegal action against him, *i. e.*, to call or induce a strike or work stoppage among the neutral employer's employees.[11] "Congress had no intention [in

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[10] The citation "Leg. Hist. LMRDA" refers to the two-volume Legislative History of the Labor-Management Reporting and Disclosure Act of 1959 (Gov't Print. Off., 1959), compiled by the NLRB.

[11] See also, 2 Leg. Hist. LMRDA, 1194 (2-3), and 1581.

Section 8 (b) (4) (ii) (B)] of preventing a union or its representatives from addressing non-coercive pleas to [neutral] employers." **Alpert v. Excavating, Etc. Union No. 379**, D. Mass., 184 F. Supp. 558, 561.[12] Congress enacted the same distinction between "coercion" and "persuasion" which the Board had made in applying the prohibition of Section 8 (a) (1) against employer "restraint and coercion" of employees. Under it, announcement of an intention to do that which one can legally do is "persuasion"; announcement of an intention to do that which one cannot legally do is "coercion."[13] The distinction is a basic and familiar one.[14]

To read the Act as condemning communication of a union's willingness to cease picketing at a common situs if and when the primary employer is removed (A-26, note 6, A-12-13, *infra*) is to misread it. That "is evidence of a desire to comply with, not to violate the law." **Schauffler v. United Slate, Tile and Composition Roofers, Local 30**, 47 LRRM 2576, 2580-2581. It is not illegal "under any possible interpretation of the statute." *Ibid.*, at p. 2580.

The approach of the Board and the court below would prohibit a union, about to go on strike, from advising the primary employer's customers of its intention to strike and picket the primary employer's plant. It would prevent

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[12] 2 Leg. Hist. LMRDA 1750 (1), 1823 (2), 1841 (3), 1104 (2-3), 1523 (1).

[13] NLRB, *Nineteenth Annual Report* (Gov't Print. Off., 1954), p. 64; NLRB, *Twenty-fourth Annual Report* (Gov't Print. Off. 1959), p. 54; *Esquire, Inc.*, 107 NLRB 1238, 1239; *Aeronca Mfg. Corp.*, 121 NLRB 777, 779; *Universal Producing Co.*, 123 NLRB 548, 550.

[14] See *Empire Theater v. Cloke*, 53 Mont. 183, 16 Pac. 107: "In short, the 'threat' conveyed was to do what the defendants lawfully could do—a mere warning of their intention, which they could lawfully give. (Cooke on *Combinations, Monopolies and Labor Unions*, secs. 77 et cit.)."

a union, on strike against a manufacturer, from advising his retail distributors of its intention to conduct a consumer boycott of the product by newspaper advertising. Yet Congress did not prevent neutral employers from attempting to avoid the adverse repercussions on themselves of lawful strike action directed against the primary employer by urging him to yield to the union's demand[15] or by ceasing to do business with the primary employer. Since Congress left neutral employers free to take such action, it cannot have intended to prevent unions from seeking to persuade neutral employers to do so by informing them of their plans or intention to take or to continue lawful strike action against the primary employer. To prohibit such communications is to infringe the freedom of speech guaranteed by Section 8 (c) and the First Amendment, see pp. 13-14, *supra*; **Alpert v. Excavating, Etc. Union No. 379**, 184 F. 2d, at 561.

To the extent that the picketing which petitioner advised Gilmore would continue was directed against Simpson, not Gilmore, in conformity with the **Moore Dry Dock** standards, what the Union was "threatening" was lawful, not unlawful, action. This Court should make it clear that the Union "had the right to do [that, and, consequently] had the right to say that [it] would." **Esquire, Inc.**, 107 NLRB 1238, 1239; cf. **Dartmouth Finishing Corp.**, 120 NLRB 262, 264.

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[15] In Section 8 (e), the clause outlawing so-called "hot cargo" contracts, Congress made it unlawful for an employer only to enter into "a contract or agreement" with a union for cessation of business; the section does not prohibit cessation which occurs at the instance of a union but not pursuant to any agreement with it. See 2 Leg. Hist. LMDRA 1750 (1), 1823 (2), and note 12, *supra*. If construed to outlaw such cessation, Section 8 (e) would have the effect of outlawing the very persuasion which Section 8 (b) (4) (ii) (B) preserves. See 2 Leg. Hist. LMDRA 1428 (1), 1707-1708.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that this petition for writ of certiorari should be granted.

Respectfully submitted,

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